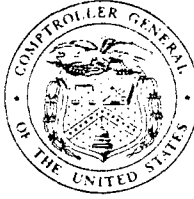


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## DECISION

THE COMPTROLLER GENERAL  
OF THE UNITED STATES

WASHINGTON, D.C. 20548

FILE: B-200268

DATE: March 17, 1981

MATTER OF: Hispano American Corporation

## DIGEST:

*[Complaint Alleging]*

1. Allegation that grantees engaged in practices and procedures which were restrictive of competition because they did not actively solicit small and minority businesses is without merit where grantees complied with applicable requirements concerning solicitation of minority businesses.
2. Grantees inclusion of bid bond requirement in bus procurement is not restrictive of competition and discriminatory to small and minority business since determinations to require bonds were consistent with applicable State law, were made in good faith and with reasonable basis.
3. Grantees failure to consider waiver of bid bond requirement is not improper where complainant failed to follow procedures established by solicitation for appealing such requirements.
4. Allegation that grantee and grantor did not comply with required procedures for obtaining grantor's prior concurrence in award to other than low bidder is without merit where grantor eventually received and considered all relevant information prior to concurring in award and there is no evidence that complainant was prejudiced by any procedural deficiency which may have occurred.

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5. Grantee did not act in restriction of competition or in discriminatory manner when it concluded that proposed awardee would supply "domestic end product" even though such determination was incorrect. While record shows that grantee's conclusion was mistaken, there is no evidence that grantee acted out of improper motivation.
6. Allegation that awardee was nonresponsive because it falsely certified it would supply domestic end product is without merit where awardee did not so certify and in any event bidder was not required to offer domestic end product as condition of responsiveness.
7. GAO declines to consider objections not raised by complainant in initial complaint since it would be inappropriate to allow grant complaint process to proceed in piecemeal manner.

Hispano American Corporation (HAC) complains of the award of contracts by the transit authorities of Seattle, Washington (METRO) and Portland, Oregon (TRI-MET) for buses. The contracts were awarded pursuant to grants administered by the Urban Mass Transportation Administration (UMTA), and were eighty-percent funded by UMTA.

At a joint bid opening held on February 15, 1980, HAC was found to be the apparent low bidder on both the METRO and TRI-MET requirements, but was subsequently rejected as nonresponsive. As a result, award was made to the next respective low bidder on each requirement, M.A.N. Truck and Bus Corporation (METRO) and Crown Coach Corporation (TRI-MET).

Essentially, HAC's complaint involves three general allegations. The first of these is that METRO and TRI-MET deliberately engaged in certain practices and procedures which were restrictive of competition and which discriminated against small and minority business participation, in violation of sections 9 and 10 of Attachment O to Office of Management and Budget (OMB) Circular A-102. Secondly, HAC

*Complainant  
complaint*

contends that neither METRO nor UMTA fully complied with certain provisions of the UMTA External Operating Manual (EOM), ch. III, § C.4., requiring that a grantee obtain UMTA concurrence prior to making award to other than the low bidder. Finally, HAC alleges that METRO acted improperly by initially determining that the product to be supplied by M.A.N. would qualify as a "domestic end product" when in fact it would not, and further that M.A.N. was a nonresponsive bidder because its product would not qualify as a "domestic end product."

HAC initially filed its complaint with UMTA which found no merit to the allegations and concurred in the contract awards. In our view, this concurrence was reasonably based. Thus, HAC's complaint is denied.

At the outset we note that UMTA prefaced its denial of HAC's complaint by stating that even if each and every issue were decided in HAC's favor, HAC would still not receive the contract award since its bid was nonresponsive to a number of specification requirements not addressed in its complaint. Consequently, it is clear that HAC could not in fact have been prejudiced by any of the deficiencies alleged in this complaint.

With regard to HAC's first basis of protest, UMTA advises that the procurement procedures applicable to its grantees at the time of this procurement are contained in the EOM and, with respect to minority business enterprise (MBE) policy, UMTA Circular 1165.1. (Circular 1165.1 was subsequently superseded by 49 C.F.R. Part 23, 45 Fed. Reg. 21172 (1980).) Neither of these documents, nor the grant agreement in use at the time, specifically incorporates Attachment O in its entirety. UMTA advises that while its policy was to comply as much as practicable with the spirit and intent of Attachment O, nothing required either METRO or TRI-MET to comply with the literal requirements of sections 9 and 10 of the Attachment, which in pertinent part address minority contracting and bonding requirements, respectively.

UMTA Circular 1165.1, however, required grantees to have an approved MBE affirmative action program including information and communication programs to make MBEs aware of contracting opportunities. More specifically, grantees were instructed that bid notices should be placed in the CBD, Dodge Bulletin, MBE trade association newsletter, major local newspapers and minority newspapers.

HAC asserts that METRO and TRI-MET did not actively solicit small and minority businesses. It alleges that METRO made no attempt to contact it personally even though its president, Joseph Lopez, had represented a bidder on a previous articulated bus procurement by Seattle and was known to METRO employees. HAC also contends that there was no advertising in leading Seattle or Portland newspapers, the Wall Street Journal, or the Journal of Commerce, and no notice in the Commerce Business Daily (CBD).

UMTA found no basis to question METRO and TRI-MET's efforts to solicit small and minority businesses since it determined that the procurement was widely advertised in daily newspapers and trade publications, and that METRO advertised in a major northwest minority-owned newspaper. UMTA also noted that even though HAC was not contacted directly (because it was not a known supplier of buses), it nevertheless received actual notice of the procurement. TRI-MET contacted HAC's president, Joseph Lopez, in an effort to notify Pegaso, another bus manufacturer which Mr. Lopez represented. (It was in this capacity that METRO also knew Joseph Lopez; METRO did not notify Lopez or Pegaso because the firm had previously indicated its unwillingness to redesign its bus to meet certain necessary requirements.) Consequently, UMTA concluded that any alleged inadequacy in the solicitation process could not have prejudiced HAC in any event. We believe that UMTA's conclusions were reasonable.

While it appears from the record that neither METRO nor TRI-MET placed a notice in the CBD, we cannot conclude that this constituted a deliberate restriction on competition, or discrimination against small and minority business participation. There is no evidence that this omission resulted from anything more than oversight. Moreover, even in direct Federal procurement, an omission of this type is considered to be a procedural deficiency, not affecting the validity of the award. Comprehensive Health Services, Inc., B-198410, August 25, 1980, 80-2 CPD 148. Further, there was no requirement that advertisements be placed in the Wall Street Journal or the Journal of Commerce, and consequently, we do not find any impropriety in the grantees' failure to advertise therein.

HAC also complains that METRO's and TRI-MET's requirements for bid bonds of five and ten percent, respectively, were unnecessary and discriminatory since small and minority businesses have limited assets and capital. In this regard, we note that UMTA Circular 1165.1 provided that, in an effort to alleviate financial barriers to program participation by MBEs, "consideration should be given to providing, waiving, or reducing bonding and insurance, where legally possible."

UMTA found that HAC's allegations in this regard were without merit since HAC did not follow the procedures established by the solicitations for appealing specification requirements, and since Circular 1165.1 in any event did not require that grantees waive bonding requirements for MBEs, but only that they consider such action. UMTA also concluded, in reliance on our decision in Technical Services Corporation, B-195838, December 18, 1979, 79-2 CPD 415, that the bid bond requirements did not unnecessarily limit competition by small and minority businesses since the determinations to use them were made in good faith and with a reasonable basis.

HAC contends that it requested bid bond waivers from METRO and TRI-MET prior to bid opening but the grantees deny that either of them ever received such a request. While there is some dispute over what, if any, steps were taken by HAC to appeal the bid bond requirements, it is undisputed that the procedures established by the solicitation were not followed. Consequently, we do not believe there is any basis on which to conclude that the grantees acted in restriction of competition or discriminated against small and minority businesses by their failure to consider waiving the bid bond requirement.

As regards the propriety of including the bid bond requirements in the solicitations in the first instance, we are aware of no prohibition on the inclusion of such requirements in grantee procurements. While HAC argues that they should be prohibited as inconsistent with national policy in support of small and minority business, we view that as a policy matter which is outside the scope of our review.

Moreover, we concur in UMTA's conclusion that the determinations to require bid bonds were made in good faith and with a reasonable basis. In this respect, we note that UMTA based its conclusion on the following facts: 1) TRI-MET submitted a legal opinion indicating that bid bonds are required by State law and cannot be waived, and METRO submitted a legal opinion indicating that they are permitted under State and local law; 2) failure of the bidders to execute the contract could result in the need to resolicit bids at increased cost and could result in substantial and unnecessary delay.

HAC suggests that the bonding requirement is a method of guarantee which could be accomplished as well by a pre-award survey. We disagree. The purpose of a bid

bond is to assure that upon acceptance of his bid, the bidder will execute such contractual documents as may be required. See Federal Procurement Regulations § 1-10.102-2 (1964 ed.). We fail to see how a pre-award survey, which is intended to determine the bidder's ability to perform satisfactorily, could serve as a substitute.

HAC also suggests that the grants-in-aid to METRO and TRI-MET were made in violation of 49 U.S.C. § 1602(a) (2)(c) (Supp. III 1979), which prohibits the use of UMTA grant funds in support of procurements utilizing exclusionary or discriminatory specifications. In view of the lack of any showing that the specifications in the instant procurement were exclusionary or discriminatory, as evidenced by the preceding discussion, we concur with UMTA's conclusion that this allegation is without merit.

We now turn to HAC's second general allegation, which is that neither METRO nor UMTA complied with certain provisions of the EOM, ch. III, § C.4., requiring prior UMTA concurrence in an award to other than the low bidder. Specifically, HAC alleges that METRO did not submit all of the documentation required by the EOM to accompany its request for award to other than the low bidder, and that UMTA concurred in the award without first receiving this documentation.

UMTA concedes that METRO did not initially submit all of the required documentation. (This includes a complete copy of all bids received; the tabulation of bids; proof that all bids for over \$2,500 were advertised; a full statement of the reasons for not awarding to the low bidder, with any supporting documentation, and an opinion of the project sponsor's attorney with respect to the legality, under State and local law, of the proposed award.) UMTA states that, nevertheless, METRO later forwarded the information necessary for obtaining UMTA's concurrence, and on that basis UMTA did concur in the award.

Based on the above, we find no basis to sustain HAC's complaint in this regard. While there is some indication in the record that METRO may not have forwarded certain documents to UMTA, UMTA states that it did receive all required documents (from whatever source) and did have an opportunity to review all relevant information prior to concurring in the award. Thus, even if METRO did not comply with the documentation requirements of the EOM in every detail, there is no evidence that any such procedural deficiency prejudiced HAC.

HAC's third area of complaint concerns the "Buy America" requirement applicable to this procurement. HAC alleges that METRO acted in restriction of competition and in a discriminatory manner by initially determining that M.A.N.'s bus would qualify as a domestic end product when in fact it would not, and then seeking a waiver of that requirement from UMTA. Further, HAC contends that M.A.N.'s bid was non-responsive because its bus would not qualify as a domestic end product, and that M.A.N. falsely certified that it would supply a domestic end product.

At the outset, we note that the "Buy America" requirement in question here is contained in the Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, § 401, 92 Stat. 2689 (1978), as implemented by regulations contained at 49 C.F.R. §§ 660.10 et seq. (1979). These regulations require that only items which have been manufactured in the United States substantially all from domestic materials may be procured with assistance from UMTA, unless the Administrator waives the application of these requirements.

The "Buy America" certificate submitted by M.A.N. stated as follows:

"The bidder or offeror hereby certifies that each end product, except the end products listed below, is a domestic end product, as defined in 49 C.F.R. § 660.13(d); and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States.

"Excluded end products (show country of origin for each excluded end product):

Engine	West Germany
Axles	West Germany
Chassis	West Germany
Part of Body Structure	West Germany

"Value of above components US \$115,000.--  
M.A.N. Truck and Bus Herewith Certifies  
that final assembly of the end product  
will take place in the United States of  
America."

Based on this information, METRO concluded that M.A.N. would supply a domestic end product.

As a result of its own review, however, UMTA concluded that M.A.N.'s bus would not in fact qualify as a domestic end product. UMTA then granted a waiver of the requirement on its own initiative since no responsive bids were received from firms offering a domestic end product. This was in accordance with the applicable regulations, which provide that a waiver may be granted by the Administrator on his own initiative, and that a waiver will be granted if a domestic end product is unavailable. 49 C.F.R. §§ 660.31(c); 660.32(a)(3). A domestic end product is presumed unavailable when no responsive domestic bid from a responsible bidder has been received. 49 C.F.R. § 660.32(d).

There is no requirement, as HAC suggests, that a bidder who will not supply a domestic end product request a waiver prior to bidding. While a bidder may request a waiver through the grantee prior to bidding, its failure to do so does not preclude UMTA from granting a waiver subsequent to bid opening. 49 C.F.R. §§ 660.31; 660.33(b).

UMTA found no impropriety in METRO's actions in this regard since it concluded that METRO mistakenly believed M.A.N. would supply a domestic end product. UMTA advises that because of this mistaken belief, METRO did not, as HAC alleges, itself request a waiver of the requirement.

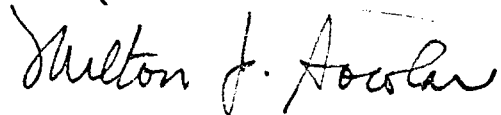
We note that there is no evidence to suggest that METRO acted out of any improper motives when it concluded that M.A.N. would supply a domestic end product. Therefore, we agree that there is no support for the allegation that METRO acted in restriction of competition or in a discriminatory manner in this regard.

Turning to HAC's contention concerning the responsiveness of M.A.N.'s bid, we first point out that M.A.N. was not required to offer a domestic end product in order to be responsive to the solicitation. The applicable regulations, reflecting the statutory right of the UMTA Administrator to waive the requirement for domestic products, state that since a domestic preference requirement, rather than an absolute "Buy America" requirement has been established, materials of foreign origin should be considered for UMTA-assisted procurements. 49 C.F.R. § 660.11(c). Consequently, the only requirement for responsiveness is that a bidder submit with the bid a completed Buy America certificate. 49 C.F.R. § 660.21(b). This was reflected in the instant solicitations which provided that "as a condition of responsiveness, the bidder shall submit with the bid a completed Buy America certificate \* \* \*."

In this case, M.A.N. did submit a completed Buy America certificate. It did not certify that it would supply a domestic end product, as HAC initially assumed. Rather, despite the fact that the end products to be purchased under the solicitation were buses, M.A.N. listed bus components, such as engine and axles, as excluded end products. Since the cost of these foreign components has been determined to exceed 50 percent of the cost of all the components, we believe that M.A.N. in effect excluded the end product (bus) from its Buy America certificate. See Arizona Industrial Machinery Company, B-191178, July 25, 1978, 78-2 CPD 68. This did not render M.A.N.'s bid nonresponsive and did not result in a "false or fraudulent" certification.

Finally, we note that in its comments on UMTA's report to this Office, HAC raised some objections additional to those in its initial complaint. These include a concern that its bid was improperly rejected as nonresponsive to certain technical requirements and that it was given insufficient time to submit a bid. In our opinion, HAC should have argued the substance of all its objections when it filed its initial complaint. We do not believe that it would be appropriate to allow the grant complaint process to proceed in a piecemeal fashion, and we therefore decline to consider these objections.

The complaint is denied.



Acting Comptroller General  
of the United States